III. Vertragsschluss

1. Zum Thema Vertragsschluss sind kürzlich drei wichtige Vorentscheide („*auto*") des *TS* ergangen: Mit zwei, am *17.2.1998* ergangenen Beschlüssen zum selben Thema legte der *TS* fest, dass ein mehrfacher, gegenseitiger Schriftwechsel zwischen den Parteien geeignet ist, einen Vertrag abzuschließen (Arts. 18-19 CISG).[20] Nicht ausreichend ist dies allerdings, um den Schluss zu ziehen, dass der Vertrag auch eine Klausel umfasst, die jeden Rechtsstreit zwischen den Parteien der Schiedsgerichtsbarkeit unterstellen würde. Ähnliche Anmerkungen macht sodann der *TS* in einem weiteren, am *26.5.1998* datierten Vorentscheid.

2. Mit Entscheid vom *28.1.2000* hat der *TS* in geschickter Weise beschlossen, dass der Versand einer Fax-Mitteilung, in welchem eine Vertragspartei um Lieferung der Waren nachsucht, die Annahme einer voran gehenden Offerte darstellt. Der *TS* hat in der Folge irrtümlicherweise anstelle von Art. 8 CISG die Vertragsauslegungsregeln des innerspanischen Rechts angewandt.[21] Dennoch war das Urteil des *TS* im Ergebnis richtig: „Marín Palomares, S.L." hat bei der Firma „Internationale Jute Maatschappij" 800.000 Jutetüten für einen Preis von USD 55.90 pro 100 Stück bestellt. Nach Abschluss des Vertrages, d.h. nach der erfolgten und zugestellten Bestellung, wollte die Käuferin den Preis nochmals verhandeln, was zu einem Austausch weiterer Fax-Schreiben zwischen den Parteien führte. Schlussendlich musste die Verkäuferin die Tüten günstiger an einen Dritten verkaufen. Die Verkäuferin forderte von der (ursprünglichen) Käuferin Schadenersatz im Umfang des Unterschieds zwischen dem mit ihr vertraglichen vereinbarten Preis und dem Erlös des Deckungsverkaufs (Art. 75 CISG). Die (ursprüngliche) Käuferin argumentierte ihrerseits, dass gar kein Vertrag zustande gekommen sei, dass sie ihr Akzept gar nie erklärt, sondern lediglich eine Gegenofferte gemacht habe.

IV. Schlussbemerkungen

1. Vermutlich besteht in Spanien, im Vergleich zu anderen Vertragsstaaten des Wiener Kaufrechts, nur eine geringe Anzahl höchstrichterlicher Entscheide, da die Parteien eines internationalen Kaufvertrages in aller Regel eine Schiedsklausel ausbedingen und somit kein Urteil publiziert wird.

2. Ein Vergleich der spanischen Rechtsprechung zum UN-Kaufrecht mit ausländischen Urteilen[22] ergibt, dass für die meisten Rechtsprobleme ähnliche Lösungsansätze gewählt worden sind. Als abweichend aufgefallen ist lediglich der oben erwähnte Entscheid der *AP Vizcaya* vom *5.11.2003*.

3. Es kann somit – auch aus spanischer Sicht – festgehalten werden, dass die nationalen Gerichte bei Auslegungsfragen, die das CISG betreffen, in der Regel einheitlich entscheiden.

The author is analyzing the legal practice applied by Spanish courts to international sales of goods contracts (CISG) with a special focus to the question and possible solutions of conflict of interests. Based on the rendered judgments it seems that the courts try to decide each case on its own merits. The Spanish case law dealing with the international sales of goods seems to be strongly in line with the jurisprudence of other member states of the Convention. However, the chosen approach to decide each case on its own merits leads to some deviating sentences that will be outlined and reviewed in the following contribution.

20 *P. Perales Viscasillas*, La formación del contrato en la compraventa internacional de mercaderías, Valencia, 1996, 151 ff.

21 *F. Oliva Blázquez*, „Aceptación, contraoferta y modificación del contrato de compraventa internacional a la luz del artículo 8 del Convenio de Viena. La indemnización de daños y perjuicios y el ‚deber de mitigar' ‚ex' artículo 77 CISG", *RdP* 5/2000, 203-219; *P. Perales Viscasillas*, La formación, 494 ff.

22 *T. Vázquez Lépinette*, Compraventa internacional de mercaderías. Una visión jurisprudencial. Pamplona, 2000, 55 ff., 107 ff.

Some thoughts about Art. 39(2) CISG

Benjamin K. Leisinger,* Basel

I. Introduction

Art. 39(2) of the Convention on Contracts for the International Sale of Goods, CISG, is a key provision of the CISG as it limits the buyer's right to rely on the non-conformity of the goods to two years after the handing over of the goods. This article states that "[…] *the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee*". However, only limited essays[1] and cases[2] explicitly deal with this issue; and they mainly focus on the relationship between Art. 39(2) CISG and domestic limitation periods. The scarcity of scholarly writings and cases dealing with this article can be attributed to several reasons. The main reason, however, is that Art. 39(1) CISG is the leading cause for the loss of the buyer's right to rely on the non-conformity of the

* The author is currently working as an academic assistant to Professor Dr. Ingeborg Schwenzer, LL.M., at the University of Basel (Switzerland). He gratefully thanks her for the support and mentoring in the preparation of this article. The author would also like to thank Francesca Mazza, Counsel at the ICC Court of Arbitration (Paris), for her encouragement to write this note, and Borzu Sabahi for the long and fruitful discussions at the Place de la Contrescarpe in the Quartier Latin-Mouffetard.

1 *See* for example: Weitnauer, Anzeige der Vertragswidrigkeit und Aufforderung zur Untersuchung nach Art. 39 Abs. 2 EKG, in: IPRax 1987, p. 221 *et seq.*; Janssen, Das Verhältnis nationaler Verjährungsvorschriften zur Ausschlussfrist des Art. 39 Abs. 2 CISG in der Schweiz, in: IPRax 2003, p. 369 *et seq.*; Will, "Meine Grossmutter in der Schweiz…": Zum Konflikt von Verjährung und Rügefrist nach UN-Kaufrecht, in: Rauscher/Mansel (eds.), Festschrift für Werner Lorenz zum 80 Geburtstag, München 2001, p. 623 *et seq.*

2 E.g.: Bundesgericht (Switzerland), 7 July 2004, CISG-online No. 848; Oberlandesgericht Stuttgart (Germany), 20 December 2004, CISG-online No. 997; Cour d'appel de Lyon (France), 18 December 2003, CISG-

goods and, hence, attracts more attention in case law and academic discussion.[3]

The question of time limitation under Art. 39(2) CISG only arises in a few important cases. For example, this article might gain significance in cases where the period under Art. 39(1) CISG has not been triggered at all, or where the buyer has a reasonable excuse under Art. 44[4] CISG.[5]

II. Purpose of Art. 39(2) CISG

The purpose of Art. 39(2) CISG is to protect the *seller* from claims arising an unreasonably long time after the contract has been performed.[6] In international trade, the need for certainty and security demands that the seller of goods be assured that disputes arising out of their delivery be subject to some "cut-off point" in the future.[7] Moreover, the more time passes, the more difficult it becomes for the seller to have recourse to his suppliers for redress owing to their role in the delivery of the non-conforming goods in question. Another aspect, namely the passage of time, makes it more and more difficult for the seller to prove that the non-conformity may not have existed at the time the risk passed, e.g. because witnesses may no longer remember.[8]

In a sense, this protection is a departure from the character of the CISG, at least as it is regarded in German speaking countries, as a generally *buyer*-friendly convention.[9]

It is important to note that the function of Art. 39(2) CISG is not to limit the buyer's right to commence judicial proceedings[10] or to set up any rules of prescription.[11] This latter limit, the limitation period, is determined by reference to the Convention on the Limitation Period in the International Sale of Goods,[12] if this Convention is applicable, or by the applicable domestic law. However, in special circumstances, Art. 39(2) CISG can be used to extend or to interpret the domestic limitation period.[13] This is the case, for example, when the domestic limitation period is shorter than two years. The reason for this is that it would be contradictory to still grant the buyer the right to give notice of, and to rely on, any non-conformity of the goods, but at the same time make such claims time-barred by the domestic statute of limitations.

III. Beginning of the period

When dealing with a provision setting forth time periods, it is essential to discuss it in terms of the beginning and the end of this period. Therefore, this article will first deal with the beginning of the period, both in normal and in exceptional circumstances, before turning to the end of the period, as well as other subsequent questions arising under Art. 39(2) CISG, such as form and content of the notice.

online No. 871; Kantonsgericht Wallis (Switzerland), 30 April 2003, CISG-online No. 896; Handelsgericht des Kantons Bern (Switzerland), 17 January 2002, CISG-online No. 725; Handelsgericht des Kantons Bern (Switzerland), 30 October 2001, CISG-online No. 956; Oberlandesgericht Graz (Austria), 24 January 2001, CISG-online No. 800; Landgericht Memmingen (Germany), 13 September 2000, CISG-online No. 820; Gerechtshof Arnhem (Netherlands), 27 April 1999, CISG-online No. 741.

3 "[Art. 39(2) CISG] is applicable only where the buyer could not have protested earlier because the lack of conformity did not come to light before then", *cf*. Rechtbank van Koophandel (Belgium), 25 April 2001, CISG-online No. 765. Also *see* Oberster Gerichtshof (Austria), 19 May 1999, CISG-online No. 484, stating that Art. 39(2) CISG is relevant in three different situations: First, if the buyer could not examine the goods at an earlier point in time, second, if the buyer could not discover the non-conformity, third, if he could not give notice of the non-conformity at an earlier point in time.

4 Art. 44 CISG states:
Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with Article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

5 *See* Schwenzer, in: Schlechtriem/Schwenzer (eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford 2005, Art. 39 para. 22. Art. 44 CISG does not apply under Art. 39(2) CISG, *cf*. Oberster Gerichtshof (Austria), 15 October 1998, CISG-online No. 380.

6 *Cf*. Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary"), Official Records, UN DOC. A/CONF. 97/5, p. 35 para. 5, online at: http://www.cisg-online.ch/cisg/materials-commentary.html#Article%2038. For cut-off periods in general, *see* Reitz, A History of Cutoff Rules as a Form of Caveat Emptor: Part I – The 1980 U.N. Convention on the International Sale of Goods, online at: http://cisgw3.
law.pace.edu/cisg/biblio/reitz1.html.

7 *Cf*. UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods (UNCITRAL Digest on the CISG), Art. 39 para. 23, online at: http://daccessdds.un.org/doc/UNDOC/GEN/V04/552/11/PDF/V0455211.pdf?OpenElement.

8 For reasons for limiting the buyer's right, *see* Schwenzer, in: Schlechtriem/Schwenzer (eds.), op. cit (footnote 5), Art. 38 para. 4.

9 *See* Oberster Gerichtshof (Austria), 27 August 1999, CISG-online No. 485.

10 *See* Cour d'appel de Grenoble (France), 13 September 1995, CISG-online No. 157, stating: "Qu'en outre, le délai préfix de deux ans mentionné au 2ème alinéa de cet article ne vise pas une action en justice". *See* also Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed., The Hague 1999, § 261.1.

11 "This provision is distinct from rules on prescription (limitation)", *see* O.R., Doc. A(6), A/CN.9/WG.2/WP.16, p. 48, para. 84.

12 Online at http://www.uncitral.org/pdf/english/texts/sales/limit/limit-conv.pdf.

13 *Cf*. Handelsgericht Bern (Switzerland), 30 October 2001, Nr. 8831 FEMA, CISG-online No. 956; Handelsgericht Bern (Switzerland), 17 January 2002, Nr. 8805 FEMA, CISG-online No. 725; Janssen, Das Verhältnis nationaler Verjährungsvorschriften zur Ausschlussfrist des Art. 39 Abs. 2 CISG in der Schweiz, in: IPRax 2003, p. 369 et seq.; Tannò, Die Berechnung der Rügefrist im schweizerischen, deutschen und UN-Kaufrecht, Dissertation, St. Gallen 1993, p. 288. Criticizing the coincidence of the "cut-off" period under Art. 39(2) CISG and the limitation period under domestic law by simply extending or interpreting the limitation period, Will suggests that the short domestic limi-

1. In normal circumstances

As has already been said, Art. 39(2) CISG states that "*the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer*". It can be inferred from the plain wording of this provision that neither delivery under Art. 31 CISG[14] et seq. nor the passing of risk can trigger the commencement of the limitation period. In neither such case would the true objective of the deal be achieved, i.e. the buyer who is interested in receiving the goods does not have them in his physical possession. Thus, the goods have to have been physically handed over.[15] Moreover, the handing over of documents representing the goods that entitle the buyer to resell or to collect the goods cannot be sufficient either. In international trade, especially where commodities are concerned, such documents can be resold[16] several times while the goods are still in transit[17] or storage before the last buyer actually takes them over.[18] Relying on the physical handing over of the goods rather than the documents makes goods sense; it is what the parties ultimately intended.

Therefore, when the goods are directly delivered to one of the buyer's customers, the handing over of the goods to that customer constitutes the relevant point in time at which the period under Art. 39(2) CISG is triggered.[19]

2. If the goods are never actually handed over

In some exceptional cases, however, the goods are never *actually handed over to the buyer*. This could occur, for example, if the goods perish due to their lack of conformity before they can be handed over.[20] Alternately, the goods may be seized or even destroyed by authorities due to the non-conformity,[21] such as where the goods are contaminated or not in compliance with national safety standards. The fact that the goods are never *actually handed over to the buyer* could also occur, if the buyer refuses to take delivery in accordance with Art. 60(b) CISG, i.e. refuses the tender.

Art. 39(2) CISG does not explicitly deal with these situations. Therefore, we have to solve this problem in conformity with the general principles underlying the CISG.

a) Destruction of the goods

According to Art. 7(2) CISG, "*questions concerning matters governed by this Convention which are not expressly settled in it are to be solved in conformity with the general principles on which it is based*". The purpose of and, therefore, the principle underlying Art. 39(2) CISG is to protect the seller from claims arising an unreasonably long time after the contract has been performed.[22] Hence, the conclusion that the limitation period under Art. 39(2) CISG never starts to run if the goods are not physically handed over would be contrary to this principle of the Convention.

However, if the goods are destroyed or perish before they can actually be handed over to the party intended, be it the buyer or the buyer's customer, several points of time for triggering the commencement of the two years period are conceivable:

One possibility would be to consider the point at which the *buyer becomes aware* of the destruction as the relevant point in time. Especially where the goods are in transit for a considerable amount of time, such as by ship, in light of modern telecommunication, awareness of destruction could be gained several months prior to when the goods – hypothetically – would have been handed over. Here, however, two different kinds of knowledge must be distinguished: First, the knowledge of *de-*

tation periods should either only start to run after a notice of non-conformity was given within the meaning of Art. 39 CISG, or that the buyer should be granted a "reasonable time" after he gave notice to assert his remedies. *See* Will, "Meine Grossmutter in der Schweiz…": Zum Konflikt von Verjährung und Rügefrist nach UN-Kaufrecht, in: Rauscher / Mansel (eds.), Festschrift für Werner Lorenz zum 80. Geburtstag, pp. 623-642, p. 640 et seq. Also following the "reasonable time" approach, *see* Piltz, Internationales Kaufrecht, München 1993, § 5 para. 90.

14 Article 31 CISG states:
If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:
(a) if the contract of sale involves carriage of the goods – in handing the goods over to the first carrier for transmission to the buyer;
(b) if, in cases not within the preceding subparagraph, the contract related to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place – in placing the goods at the buyer's disposal at that place;
(c) in other cases – in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

15 *Cf.* Schwenzer, in: Schlechtriem / Schwenzer (eds.), op. cit (footnote 5), Art. 39 para. 24; O.R., Doc. C(4), A / CONF.97 / C.1 / SR.1, p. 349, paras. 59-65. Pursuant to Art. 60(b) CISG, the buyer has an obligation to physically take over the goods. *Cf.* Schwenzer, in: Schlechtriem / Schwenzer (eds.), op. cit (footnote 5), Art. 60 para. 2a.

16 This can be carried out by selling the *document of title*, such as bill of lading, representing the goods. These sales are still governed by the CISG. The Secretariat Commentary, op. cit. (footnote 6), p. 16 para. 8, online at: http://www.cisg-online.ch/cisg/materials-commentary.html#Article%202, explicitly states: "[Art. 2(d) CISG] does not exclude documentary sales of goods from the scope of this Convention even though, in some legal systems, such sales may be characterized as sales of commercial paper".

17 So called *sale in transit*, *see* Ramberg, International Commercial Transactions, 3rd ed. Stockholm 2004, p. 42.

18 *Cf.* Mullis, Avoidance for Breach under the Vienna Convention; A Critical Analysis of some of the Early Cases, in: Andreas [&] Jarborg (eds.), Anglo-Swedish Studies in Law, Lustus Forlag (1998), p. 329 et seq.

19 *See* Schwenzer, in: Schlechtriem / Schwenzer (eds.), op. cit (footnote 5), Art. 39 para. 24; O.R., Doc. C(4), A / CONF.97 / C.1 / SR.1, p. 349, para. 57, 58; Kuoppala, Examination of the Goods under the CISG and the Finnish Sale of Goods Act, Turku 2000, para. 4.5.2., online at: http://www.cisg.law.pace.edu/cisg/biblio/kuoppala.html#iv.

20 In such cases, Art. 39 CISG only applies where the risk has already passed under Arts 67 to 69 CISG or according to certain terms of the contract, e.g. if the parties agreed on "FOB" or another clause of the INCOTERMS where, under their clauses A5 and B5 governing the passing of risk, the risk has already passed at this point. In cases where the risk has not passed, such a situation would result in a non-delivery.

21 *See* for example Bundesgerichtshof (Germany), 2 March 2005, CISG-online No. 999.

22 *See supra*.

struction due to the non-conformity; and second, the knowledge of the *destruction per se*.[23]

In the first scenario, reliance on the buyer's knowledge could lead to the unequal treatment of similar situations and would, therefore, not create legal certainty. In situations where it is obvious, or at least easy, to discover that the destruction was due to the non-conformity of the goods and not to a carrier's breach of contract, the period under Art. 39(2) CISG would be triggered instantly. This result would be in accordance with the Convention's policy of protecting the seller. However, in situations where it is hard to establish the cause of the destruction or perishment, the period under Art. 39(2) CISG would only be triggered a considerable time after the hypothetical point of handing over of the goods. In extreme cases this could occur after more than two years, such as where expert's statements are necessary to find out whether it was the packaging of the goods,[24] another non-conformity, merely the inappropriate transportation, or other reasons[25] that caused the destruction.[26] This result would clearly be against the article's principle of protecting the seller. More importantly, this approach would result in the periods under Art. 39(1) CISG and Art. 39(2) CISG being triggered simultaneously, thus rendering Art. 39(2) CISG superfluous. Hence, when relying on the knowledge of the destruction as the relevant point in time, only the knowledge of the *destruction per se* could be appropriate to trigger the period under Art. 39(2) CISG.

In both scenarios, a general argument against determining the period of time as commencing with *knowledge*, be it *per se* or also of the cause for destruction, is that Art. 39(2) CISG clearly differentiates between any knowledge, including hypothetical knowledge,[27] which triggers the period under Art. 39(1) CISG, and the beginning of the period under Art. 39(2) CISG, which is triggered by handing over the goods.

As an alternative to relying on knowledge, the time of the *hypothetical handing over* could also be relied upon to trigger the time period under Art. 39(2) CISG.

Here, the main critique might be that the goods are never actually handed over and, hence, according to the strict wording of Art. 39(2) CISG, this period never begins to run. But, as has already been said, this result would be against the principle of seller protection under this very article. Therefore, we have to look for other alternatives. It is submitted that a hypothetical point in time for handing over should trigger the period. This solution comes closest to the time frame that the "fathers" of the Convention intended to apply, as both in the case of actual handing over as well as in the case of hypothetical handing over, the same *dates* become relevant. Moreover, this point of time is the most objective and is not subject to as many external coincidences as the point in time of knowledge of the destruction would be – such as whether the carrier has a mobile phone –, and would, therefore, only vary by few days.[28] Most importantly, this interpretation departs only marginally from the plain wording of Art. 39(2) CISG.

In conclusion, there are more factors favouring the hypothetical approach. Therefore, in cases where the goods are never actually handed over because of the destruction of the goods and Art. 39 CISG is applicable, the period of time under Art. 39(2) CISG should be triggered by the date of the *hypothetical* handing over of the goods, which can be easily construed from the usual duration of the agreed transportation or even from the planned or agreed date for handing over.

b) Buyer's refusal to take over the goods

Yet another interesting situation in which the goods are never actually handed over arises where the buyer refuses to take over the goods or rejects any documents, i.e. refuses the tender.[29] Here, as the buyer at least believes he has bona fide reasons for refusing the goods or documents, the period under Art. 39(1) CISG is thereby simultaneously triggered and the question of the period under Art. 39(2) CISG becomes less important. However, if Art. 39(2) CISG was indeed to become relevant,[30] the same question of whether and when this two years period is triggered has to be answered.

Art. 10(2) of the Convention on the Limitation Period in the International Sale of Goods provides a possible solution. This Convention was intended to be a sister convention[31] to the CISG and, therefore, may be consulted as a persuasive authority here. This article states that "*a claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer*". Thus, Art. 10(2) of the Limitation Convention does indeed equate the situation where the goods are handed over to the buyer with the situation where the buyer refuses the tender. The wording of this article, i.e. "*actually handed over*", as well as the interpretation[32] of that expression – actual handing over means physical handing over – are identical to those under the CISG.

Therefore, it is submitted that "refusal of the tender" should also be equated with "actual handing over" under Art. 39(2) CISG and that the *buyer's refusal to take over the goods or documents* should trigger the commencement of the period.

23 *Destruction per se* means that the buyer knows that the goods have been destroyed, but does not know the exact reason for the destruction.

24 The insufficient packaging of the goods can also amount to a non-conformity of the goods. *Cf.* Schwenzer, in: Schlechtriem / Schwenzer (eds.), op. cit. (footnote 5), Art. 35 para. 11.

25 An example of such other reasons, which one could also subsume under inappropriate transportation, is rough cargo handling. *See* Ramberg, op. cit. (footnote 17), p. 60.

26 Sometimes both parties are negligent in finding out the exact reason for the destruction, as they usually take out insurance, with the consequence that it is the insurance company facing the detriment. In practice, therefore, the ultimate risk allocation is a battle between insurers. *See* Ramberg, op. cit. (footnote 17), p. 63. The insured, however, may be liable for a breach of its duty under the insurance contract for negligence.

27 The period of time under Art. 39(1) CISG begins to run after the buyer has discovered the non-conformity or *ought to have discovered it*.

28 In cases where the parties have agreed on a certain date, there would not be any uncertainty at all.

29 For a thorough discussion of the buyer's right to refuse to take delivery of non-conforming goods under the CISG, *see* Schlechtriem, Interpretation, gap-filling and further development of the UN Sales Convention, online at: http://www.cisg-online.ch/cisg/Schlechtriem-e.pdf.

30 In the author's imagination this can only be the case where the buyer has a reasonable excuse to give notice of non-conformity under Art. 44 CISG and only gave reasons for his refusal to take over the goods or documents towards the carrier.

31 *See* Kazuaki Sono, The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility, I., online at: http://www.cisg.law.pace.edu/cisg/biblio/sono3.html#i.

32 *See* Official Commentary to this Convention, Art. 10, online at: http://www.uncitral.org/pdf/english/yearbooks/yb-1979-e/vol10-p145-173-e.pdf; Müller-Chen, in: Schlechtriem / Schwenzer (eds.), op. cit. (footnote 5), Art. 10 of the Limitation Convention, para. 5.

What can be said in favour of this approach is that it protects the seller while not discriminating the buyer. The seller is protected by limiting the buyer's right to rely on any non-conformity of the goods to two years after the rejection; the buyer is not discriminated as he at least should know the reason for his rejection and, therefore, should be able to give notice of non-conformity within the following two years. In addition to that, this approach is independent from the question whether the buyer, when rejecting the goods,[33] has to take them in possession on behalf of the seller in accordance with Art. 86(2) CISG in order to preserve them and "physical handing over" in some sense takes place in the end.

IV. End of the period

Having dealt with the *beginning* of the period, this article will now turn to its *end*.

Art. 39(2) CISG does not state when its two-year period ends, nor does it state how the period should be calculated. Art. 20(2) CISG, however, deals with the calculation of another period, namely the period for timely acceptance of an offer. This provision states that "[o]*fficial holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows*". As mentioned before, Art. 7(2) CISG allows reliance on the general principles underlying the CISG. The principle underlying Art. 20(2) CISG is to include official holidays etc. in the calculation of a period of acceptance. It is submitted that the principle underlying Art. 39(2) CISG is the same. Thus, holidays etc. should also be included in calculating the period under Art. 39(2) CISG. However, it should be noted that, when solving other problems, such as whether two years are considered to be a certain number of days, i.e. 730 days, or a period from one date in the year the period commences to the same date two years later,[34] the applicable domestic law is to be consulted.[35]

One last thing worthy of mention here is that Art. 39 CISG only requires that the notice is *given* within the respective periods. Pursuant to Art. 27 CISG, the seller bears the transmission risk, i.e. the risk that the notice is lost on its way to the seller.[36]

V. Contractual period of guarantee

In line with the general principle of party autonomy underlying the CISG,[37] the time limit of Art. 39(2) CISG is subject to any other contractual period of guarantee granted by the seller or stipulated between the parties. It is irrelevant whether the contracted period actually extends or shortens the two year period under Art. 39(2) CISG.[38]

It is important to note that the contractual stipulations have to be *inconsistent* with the time limit under Art. 39(2) CISG in order to have an impact on this article.[39] Such a stipulation is obviously inconsistent with the two-year limit under Art. 39(2) CISG if the period of the guarantee exceeds two years.[40] However, when the stipulated guarantee period is shorter than the two years, the contract has to be interpreted in order to clarify whether this shorter period is, in fact, inconsistent with Art. 39(2) CISG. For example, when the seller grants the buyer additional remedies, such as the immediate replacement of non-conforming parts after a simple complaint is made within a certain time limit, e.g. 60 days after the buyer takes over the goods, this period of guarantee is not inconsistent with the period of Art. 39(2) CISG, as it merely supplements the buyer's remedies under the CISG.[41]

VI. Ex officio character

Another important procedural question is whether the parties[42] in legal proceedings have to rely on Art. 39(2) CISG, or not. When answering this question, again, the purpose of Art. 39(2) CISG has to be taken into account. When the drafters of the Convention decided to protect the seller, it was not only the individual seller, but sellers in general, who were supposed to be protected. Several representatives held that such a cut-off period was important, as it was difficult to obtain evidence a long time after the contract had been performed, and claims more than two years after the handing over of the goods would be of doubtful merit.[43] Furthermore, other general principles like legal certainty[44] were taken into account and the two-year limit was accepted as a compromise only reached[45] after lengthy discussions. Accordingly, it is not upon the seller in each case to state that the buyer is precluded from relying on any non-conformity; rather, the arbitrators or judges have to apply

33 "[The buyer] is not obligated to take possession of the goods under paragraph (2) [of Art. 86] if before the arrival of the goods he rejects the *shipping documents* because they indicate that the goods do not conform to the contract". *See* Secretariat Commentary, op. cit. (footnote 6), p. 62 para. 4, online at: http://www.cisg-online.ch/cisg/materials-commentary.html#Article%2075, emphasis added by the author.

34 This period could be different because of leap years. Here, holidays etc. would be automatically included and the result would be in perfect conformity with the solution provided for by the CISG.

35 *Cf.* Schwenzer, in: Schlechtriem/Schwenzer (eds.), op. cit. (footnote 5), Art. 39 para. 25.

36 Art. 27 CISG states:
Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

37 Art. 6 CISG fundamentally states that *"[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions"*.

38 *Cf.* Schwenzer, in: Schlechtriem/Schwenzer (eds.), op. cit. (footnote 5), Art. 39 paras. 26, 34, 35.

39 *Cf.* Schwenzer, in: Schlechtriem/Schwenzer (eds.), op. cit. (footnote 5), Art. 39 para. 26.

40 *See* Sono, in: Bianca/Bonell (eds.), Commentary on the International Sales Law, Milan 1987, p. 311, para. 3.4., online at: http://www.cisg.law.pace.edu/cisg/biblio/sono-bb39.html.

41 *Cf.* Enderlein, in: Enderlein/Maskow/Strohbach, Internationales Kaufrecht, Berlin 1991, Art. 39 para. 8.

42 In fact, it would be the seller relying on that provision.

43 *See* O.R., Doc. A(10)(b), A/CN.9/100, annex III, p. 100, para. 107.

44 At the Diplomatic Conference, Mr. Herber, representative of the Federal Republic of Germany, stated that "there was need to have a clear rule on who bore the risk of undiscovered non-conformity". *See* O.R., Doc. C(4), A/CONF.97/C.1/SR.1, p. 348, para. 40.

45 *Cf.* O.R., Doc. C(4), A/CONF.97/C.1/SR.1, p. 348, para. 45.

Art. 39(2) CISG *ex officio*, i.e. even when the seller in the case at hand does not rely on this provision.[46]

VII. Content of the notice of non-conformity

A substantial issue that regularly arises is the standard that the notice has to meet as regards content.

Art. 39(2) CISG does not explicitly state what standard is to be applied when deciding whether the content of any alleged notice of non-conformity is sufficient. However, Art. 39(1) CISG states that the buyer has to give notice to the seller *specifying* the nature of the lack of conformity. This means that the notice has to be sufficiently substantiated as to place the seller in the position to know, in good faith, the substance of the non-conformity and to enable him to take the necessary steps to either cure the non-conformity or to prepare for legal proceedings, etc.[47] This standard also applies under Art. 39(2) CISG. If the drafters of the Convention had not wanted the standard under Art. 39(1) CISG to also apply under Art. 39(2) CISG, they would have explicitly stated so. In any event, due to the international character of the CISG, which is relevant under Art. 7(1) CISG[48] in interpreting Art. 39(2) CISG, the standard applied under Art. 39(1) CISG is not a very strict one. General statements of dissatisfaction, however, are not sufficient.[49]

Some authors hold that, in this age of electronic communication, a seller could be expected to make inquiries of the buyer after receiving a non-specific notice of lack of conformity, and that, in general, the buyer must therefore be permitted to substantiate his notice immediately.[50] While this is true and reasonable in the setting of Art. 39(1) CISG, a slightly different standard has to be applied under Art. 39(2) CISG. Here, unlike under Art. 39(1) CISG, as there is no flexible period of time, but rather a "precise and non-variable"[51] period, there is a danger that a buyer may give an unsubstantiated notice simply to prevent the period for relying on any non-conformity from lapsing. Such a non-specific notice cannot, therefore, lead to the result that the absolute time limit of two years is extended in any way. This is also supported by the fact that Art. 39(2) CISG states that the notice must be given "at the latest" within two years.[52] Furthermore, as the period under Art. 39(2) CISG cannot be suspended or interrupted at all,[53] it cannot be suspended or interrupted by such an unspecified notice, either.

VIII Formal requirements

As under Art. 39(1) CISG, any notice under Art. 39(2) CISG does not need to meet any formal requirements. It can even be made orally, as long as the seller is able to understand it.[54] However, due to the fact that the buyer has to prove that he actually gave notice under Art. 39 CISG,[55] it is wise to choose a means of communication that allows reproduction and proof of the date of the notice.

IX. Final remarks

As has been shown, Art. 39(2) CISG raises some interesting questions. However, when using the tools of the CISG, especially Arts. 7(1) and 7(2) CISG, most of these questions can be answered in a reasonable way. These tools make it possible to answer the question if and when the period under Art. 39(2) CISG is triggered if the goods never have been actually handed over to the buyer – it is triggered by the *hypothetical* handing over in case of the destruction of the goods and by the *buyer's refusal* in the case of rejection of the goods or documents. They also provide for an answer when asking how the period under Art. 39(2) CISG is calculated and what the content and form of such notice has to be.

This again shows that the CISG is a flexible convention, best suited for meeting the needs of legal certainty, flexibility and reasonableness in international trade.

46 *Cf.* Schwenzer, in: Schlechtriem / Schwenzer (eds.), op. cit. (footnote 5), Art. 39 para. 23; Brunner, UN-Kaufrecht – CISG, Bern 2004, Art. 39 para. 16; Schlechtriem, Internationales UN-Kaufrecht, 2nd ed., Tübingen 2003, p. 111, para. 160.

47 *See* Schwenzer, in: Schlechtriem / Schwenzer (eds.), op. cit. (footnote 5), Art. 39 para. 6; Honnold, op. cit. (footnote 10), § 256; Landgericht Saarbruecken (Germany), 26 March 1996, CISG-online No. 391. For an overview of cases regarding the specificity of the notice under Art. 39(1) CISG, see CISG-AC Opinion no 2, Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39, 7 June 2004, Rapporteur: Professor Eric Bergsten, Emeritus, Pace University New York, online at: http://www.cisg-online.ch/cisg/docs/CISG-AC_Op_no_2.pdf.

48 Art. 7(1) CISG states:
In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

49 *See* OLG Oldenburg (Germany), 28 April 2000, CISG-online No. 683, Bundesgericht (Switzerland), 13 November 2003, CISG-online No. 840.

50 *See* Schwenzer, in: Schlechtriem / Schwenzer (eds.), op. cit. (footnote 5), Art. 39 para. 7; Bernstein / Lookofsky, Understanding the CISG in Europe – *A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, Boston 1997, p. 92 et seq.; Brunner, op. cit. (footnote 46), Art. 39 paras. 6, 7; Honnold, op. cit. (footnote 10), § 256.

51 *See* UNCITRAL Digest on the CISG, op. cit. (footnote 7), Art. 39 para. 23.

52 Several representatives in Vienna were even of the opinion that the limit should be shortened to only one year. However, taking the needs of developing countries into account, the drafters decided not to shorten the period. *See* O.R., Doc. A(11), A/CN.9/100, p. 55, para. 61; O.R., Doc. B(1), A/32/17, annex I, p. 39, para. 203 et seq.; O.R., Doc. C(2), A/CONF.97/9, p. 77.

53 *Cf.* Schwenzer, in: Schlechtriem / Schwenzer (eds.), op. cit. (footnote 5), Art. 39 para. 23; Enderlein, in: Enderlein / Maskow / Strohbach, op. cit. (footnote 41), Art. 40 para. 6.

54 *Cf.* Salger, in: Witz / Salger / Lorenz, International Einheitliches Kaufrecht, Heidelberg 2000, Art. 39 para. 10; Oberster Gerichtshof (Austria), 15 October 1998, CISG-online No. 380.

55 *See* Schwenzer, in: Schlechtriem / Schwenzer (eds.), op. cit. (footnote 5), Art. 39 para. 38; Salger, in: Witz / Salger / Lorenz, op. cit. (footnote 54), Art. 39 para. 7.